

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs January 24, 2006 at Knoxville

**WILLIAM HERMAN v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Rutherford County**  
**No. 52615     Don R. Ash, Judge**

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**No. M2005-00405-CCA-R3-CO - Filed April 11, 2006**

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The pro se petitioner, William Herman, appeals the lower court's order construing his motion for a delayed appeal as a petition for post-conviction relief and denying his request for a delayed appeal. After a review of the record and applicable law, we affirm the judgment below.

**Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P. J., and JOSEPH M. TIPTON, J., joined.

William Herman, Appellant, Pro Se.

Paul G. Summers, Attorney General & Reporter; Benjamin A. Ball, Assistant Attorney General; and William C. Whitesell, Jr., District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

A Rutherford County jury convicted the defendant of attempted second degree murder, especially aggravated kidnapping, two counts of reckless aggravated assault, and aggravated assault, for which he received an effective 20-year sentence with 100 percent service on June 18, 2003. On January 25, 2005, the defendant filed a notice of delayed appeal, which the lower court construed as a petition for post-conviction relief seeking a delayed appeal. On February 2, 2005, the lower court denied the petitioner's request, and the petitioner subsequently brought the instant appeal challenging that decision.

Specifically, the petitioner alleges that the lower court erroneously construed his notice of delayed appeal as a petition for post-conviction relief without affording him an evidentiary hearing and that the trial court violated his constitutional rights by denying his request for a direct appeal. The state responds that the lower court correctly construed the petitioner's request as a petition for post-conviction relief because the only venue allowing the petitioner to file his request

for a delayed appeal is the Post-Conviction Procedure Act. Moreover, the state asserts that the lower court correctly denied the petitioner's request as time-barred because the request for a delayed appeal was filed outside of the applicable statute of limitations and the petitioner did not allege a basis for tolling the statute of limitations.

The state is correct in its assertion that a delayed appeal must be sought under the Post-Conviction Procedure Act, which provides for a delayed appeal when the petitioner has been "denied the right to an appeal from the original conviction." Tenn. Code Ann. § 40-30-113(a) (2003). In *State v. Evans*, 108 S.W.3d 231, 235-36 (Tenn. 2003), our supreme court recognized that the substantive right to a delayed appeal was established by the Post-Conviction Procedure Act, *see* Tenn. Code Ann. § 40-30-113(a). As such, "the statute of limitations for post-conviction relief applies to delayed appeals as well, because the petitioner must comply with the post-conviction procedure act to obtain a delayed appeal." *Handley v. State*, 889 S.W.2d 223, 224 (Tenn. Crim. App. 1994).

The petitioner's judgments were entered on June 18, 2003, and became final one month later. *See* Tenn. R. App. P. 4(a), (c); *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). Accordingly, the petitioner had one year from that date to request his delayed appeal. *See* Tenn. Code Ann. § 40-30-102(a) (2003) (requiring that post-conviction petitions be filed "within one (1) year of the date on which the judgment became final" when no appeal of that final judgment has been sought). Thus, the petitioner's instant request for a delayed appeal, which was filed on January 25, 2005, is time-barred unless the petitioner has alleged certain bases for his delayed appeal that toll the statute of limitations. *See id.* § 40-30-102(b). Those bases are: (1) claims based on an appellate court ruling concerning a constitutional right not recognized at the time of the trial and given retroactive effect by the appellate courts; (2) claims based upon newly discovered evidence which establishes that the petitioner is actually innocent of the crime; and (3) claims which arise out of a situation where the petitioner received an enhanced sentence for a crime based on previous convictions which were later held to be invalid. *See id.* However, the petitioner has not made any such claims, and the record does not reveal that any apply. Accordingly, we hold that the lower court properly denied the petitioner's request for a delayed appeal.

As we have noted, the circuit court construed the proceeding initiated by the petitioner as a petition for post-conviction relief, and the claim for a delayed appeal is suggestive of a post-conviction proceeding. We have now adjudicated the issue on appeal. We are aware, however, that the petitioner filed a "notice" of "delayed" appeal and claims that he did not intend to file a *petition* for a delayed appeal. Upon our review of his filing as a notice of appeal, we hold, pursuant to Tennessee Rule of Appellate Procedure 4(a), that no interest of justice excuses the untimely filing of the notice. Thus, we would not waive the time requirement of Rule 4(a).

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JAMES CURWOOD WITT, JR., JUDGE